

2011 IL App (2d) 110408-U
No. 2-11-0408
Order filed June 5, 2012

NOTICE: This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT

JPMORGAN CHASE BANK as Trustee of)	Appeal from the Circuit Court
Residential Funding Company, LLC f/k/a,)	of McHenry County.
Residential Corporation,)	
)	
Plaintiff-Appellee,)	
)	
v.)	No. 08-CH-634
)	
MUZAFFER ANSARI a/k/a)	
M. Zahid Ansari,)	Honorable
)	Michael T. Caldwell
Defendant-Appellant.)	Judge, Presiding.

PRESIDING JUSTICE JORGENSEN delivered the judgment of the court.
Justices Hutchinson and Burke concurred in the judgment.

ORDER

Held: Appeal dismissed for lack of jurisdiction where defendant did not file a notice of appeal within 30 days of the trial court's ruling on defendant's first section 2-1401 petition.

¶ 1 Plaintiff, JPMorgan Chase Bank, filed a mortgage foreclosure complaint against defendant, Muzaffer Ansari. The trial court entered a judgment for foreclosure and sale, noting that the order was a final order. More than two years later, defendant moved to vacate the judgment and the court denied the motion. Defendant next filed a section 2-1401 petition to vacate the judgment (735 ILCS

5/2-1401 (West 2008)), and, in response, plaintiff moved to strike defendant's petition. The trial court granted plaintiff's motion to strike and struck/denied defendant's 2-1401 petition. Defendant appeals. We dismiss the appeal for lack of jurisdiction.

¶ 2

I. BACKGROUND

¶ 3 On April 7, 2008, plaintiff, as mortgagee, filed a complaint to foreclose mortgage against defendant, the mortgagor, for mortgaged property located at 2020 Julia Way in Lakemoor. 735 ILCS 5/15-1101 (West 2008). Plaintiff attached to its complaint a copy of the mortgage note, which identified Option One Mortgage Corporation as the mortgagee. Attached to the note was an allonge, which appeared to assign the mortgage to plaintiff as trustee of Residential Funding Corporation.

¶ 4 On April 8, 2008, plaintiff moved for the appointment of a special process server and the court approved the appointment on the same day. An April 11, 2008, affidavit by the process server notes that defendant was served by substitute service at his abode (to his brother). Defendant did not file an appearance or answer the complaint. On June 11, 2008, plaintiff moved for entry of a default judgment.

¶ 5 On June 24, 2008, the trial court granted the default judgment and a judgment for foreclosure and sale, finding that "certain Defendant(s) have failed to appear and/or plead." (Defendant does not dispute plaintiff's assertion that he was present at this hearing.) The court's order stated that "This is a final and appealable order and there is no just cause for delaying the enforcement of this judgment or appeal therefrom." The court order also stated that the court retained jurisdiction to enforce the judgment.

¶ 6 Plaintiff subsequently scheduled a sale of the subject property, but, due to an intervening bankruptcy, the sale could not be conducted. After the bankruptcy was dismissed, plaintiff again

scheduled a sale, which occurred on June 7, 2010. Plaintiff was the successful bidder. On August 20, 2010, plaintiff moved for an order approving the report of sale and distribution.

¶ 7 On August 27, 2010, more than two years after entry of the default judgment, defendant moved to vacate the June 24, 2008, order of default and judgment of foreclosure and sale, arguing that: (1) the record contained no order confirming any sale; and (2) defendant had meritorious issues he wished to raise, including that there was a question whether plaintiff had standing to bring the action (because it was different than the named mortgagee in the copy of the mortgage attached to its complaint and from the holder of the note also attached thereto), and other defenses (involving disclosures, appraisal fraud, predatory lending practices, and insurance subrogation). No affidavit was attached to this motion, and defendant's attorney also moved for leave to file *instantly* an appearance.

¶ 8 The trial court set a briefing schedule on defendant's motion to vacate. As to the motion to vacate, plaintiff argued that: (1) defendant's motion was brought more than two years after the entry of the final order (*i.e.*, the judgment of foreclosure, which contained language rendering it a final order) and, thus, was improper and should be denied; (2) defendant's motion was not supported by affidavit; (3) defendant was in court on June 24, 2008, and the entry of judgment was entered with an extension of redemption, which defendant had requested; thus, defendant should be estopped from challenging the entry of judgment because he accepted the benefits of the court's extended redemption period; (4) the fact that defendant was present in court when the judgment was entered demonstrated a lack of diligence in bringing a motion to vacate over two years later and a lack of diligence in presenting any defense in the underlying case (which it further argued were forfeited);

(5) a copy of the assignment of the mortgage from the original mortgagee to plaintiff¹ demonstrated that there was no standing defense; and (6) defendant's motion contained no specific allegations.

¶ 9 On October 5, 2010, plaintiff moved for an order approving the report of sale and distribution, and, on November 2, 2010, moved for an order confirming the sale and for an order of possession. On November 2, 2010, the trial court entered an order approving the report of sale and distribution confirming sale and order for possession. It also denied defendant's motion to vacate.

¶ 10 On November 15, 2010, defendant filed a petition pursuant to section 2-1401 of the Code of Civil Procedure (Code) (735 ILCS 5/2-1401 (West 2008)) to vacate the "*ex parte*" default judgment, arguing that: (1) the trial court never acquired personal jurisdiction over him because he was never served with summons (raised for the first time); (2) plaintiff had no standing to bring suit; (3) the purported assignment of the mortgage was ineffective because the note was separated from the mortgage, the assignment did not contain the identity of the grantee, and it was noncontemporaneous.

¶ 11 On December 15, 2010, pursuant to section 2-615 of the Code (735 ILCS 5/2-615 (West 2008)), plaintiff moved to strike defendant's section 2-1401 petition, arguing that: (1) defendant's petition was filed more than two years after entry of judgment, which is beyond the two-year period for filing 2-1401 petitions; (2) defendant forfeited his ability to contest personal jurisdiction where he raised it for the first time in a 2-1401 petition, and, in any event, he was properly served; (3) service of defendant's petition was improper; (4) defendant's petition failed to establish any of the requirements for a 2-1401 petition; and (5) equity did not favor defendant.

¹The assignment, which was recorded on October 19, 2006, is dated May 2, 2005.

¶ 12 On March 29, 2011, the trial court granted plaintiff's motion to strike and struck/denied defendant's 2-1401 petition. On April 28, 2011, defendant appealed from the trial court's March 29, 2011, order.

¶ 13 II. ANALYSIS

¶ 14 Defendant argues that: (1) plaintiff does not have standing to bring this action because it is not the mortgagee and payee on the mortgage and note attached to the complaint; (2) the trial court did not acquire personal jurisdiction over him prior to the entry of default judgment because he was not served with a summons; and (3) there was an "obvious alteration" of the mortgage assignment and a separation of the note and mortgage.

¶ 15 Plaintiff argues that this court lacks jurisdiction over this appeal. It contends that the trial court's June 24, 2008, judgment for foreclosure and sale was a final order and that defendant's first application for relief, the August 27, 2010, motion to vacate, was untimely and that his second application for relief, his November 15, 2010, petition to vacate, was also untimely and constituted an impermissible successive postjudgment motion that did not toll the time for filing a notice of appeal. Without citation to any authority, defendant responds that: (1) his motion to vacate was not a 2-1401 petition; (2) the judgment for foreclosure and sale was not a final order; and (3) the additional proceedings (including the judgment confirming the sale) were inconsistent with interpreting the judgment of foreclosure and sale as a final order. For the following reasons, we conclude that we do not have jurisdiction over this appeal and, therefore, we dismiss it.

¶ 16 Generally, a judgment ordering a mortgage foreclosure is not final and appealable until the trial court enters an order approving the sale and directing the distribution. *In re Marriage of Verdung*, 126 Ill. 2d 542, 555-56 (1989). This is because a judgment of foreclosure does not dispose

of all of the issues between the parties and does not terminate the litigation. *JP Morgan Chase Bank v. Fankhauser*, 383 Ill. App. 3d 254, 260 (2008). “However, a judgment of foreclosure is final and immediately appealable where it contains language pursuant to Rule 304(a) ([Ill. S. Ct. R. 304(a) (eff. Feb. 26, 2010)]) that there is no just reason for delaying enforcement or appeal.” *Id.*; see also *Deutsche Bank National Trust Company v. Snick*, 2011 IL App (3d) 100436, at ¶8.

¶ 17 Here, the trial court’s June 24, 2008, order granting the default judgment and judgment for foreclosure and sale stated that: “This is a final and appealable order and there is no just cause for delaying enforcement of this judgment or appeal therefrom.” Pursuant to Rule 304(a), this constituted a final order. The fact that the trial court retained jurisdiction to oversee the sale and reimbursement did not render nonfinal the June 24, 2008, order. *Fankhauser*, 383 Ill. App. 3d at 260-61.

¶ 18 Having determined that the June 24, 2008, order was a final order, we next assess defendant’s August 27, 2010, motion to vacate the June 24, 2008, order. “When a motion to vacate is brought more than 30 days after the entry of a final judgment, that motion will ordinarily be construed as a petition for relief from a final judgment under section 2-1401 of the Code.” *In re J.D.*, 317 Ill. App. 3d 445, 448 (2000); see also *JP Morgan Chase Bank v. Fankhauser*, 383 Ill. App. 3d 254, 261 (2008) (where motion to vacate was filed more than 30 days after entry of final judgment, trial court properly construed it as a section 2-1401 petition). We construe defendant’s motion to vacate as a section 2-1401 petition. Section 2-1401 provides a statutory procedure that allows for the vacatur of a final judgment older than 30 days. 735 ILCS 5/2-1401(a) (West 2008); *People v. Vincent*, 226 Ill. 2d 1, 7 (2007). The statute requires that a petition be supported by affidavit or other appropriate showing as to matters not of record. 735 ILCS 5/2-1401(b) (West 2008); *Vincent*, 226 Ill. 2d at 7.

It further provides that a petition must be filed not later than two years after the entry of the judgment, excluding time during which the person seeking relief is under legal disability or duress or the ground for relief is fraudulently concealed. 735 ILCS 5/2-1401(c) (West 2008); *Vincent*, 226 Ill. 2d at 7. The two-year limitations period is strictly construed. *Sidwell v. Sidwell*, 127 Ill. App. 3d 169, 173 (1984). Relief under section 2-1401 is predicated upon proof, by a preponderance of the evidence, of a meritorious claim or defense in the original action and of diligence in pursuing both the original action and the section 2-1401 petition. *Vincent*, 226 Ill. 2d at 7-8. Here, defendant's August 27, 2010, motion to vacate the June 24, 2008, order was brought more than 30 days after the order to which it was directed (and, thus, is properly construed as a section 2-1401 petition), but not within two years of the entry of that order. Thus, it was untimely, and the trial court properly denied it.

¶ 19 Next, defendant did not file a notice of appeal. See Ill. S. Ct. R. 304(b)(3) (eff. Feb. 26, 2010) (a judgment or order granting or denying a section 2-1401 petition is final and appealable). Rather, on November 15, 2010, three months after he filed his motion to vacate and two weeks after the trial court denied that motion, defendant petitioned under section 2-1401 to vacate the trial court's June 24, 2008, default judgment. This petition, like defendant's August 27, 2010, motion to vacate, was directed at the June 24, 2008, judgment and was filed more than 30 days after that judgment. With the exception of personal jurisdiction, which defendant raised for the first time in this petition, we note that defendant's petition raised arguments identical to those in his August 27, 2010, motion. The trial court has no authority to grant relief under a section 2-1401 petition that raises the same issues as those raised in a previous section 2-1401 petition. *In re Marriage of Kirk*, 85 Ill. App. 3d 805, 808 (1980). This principle also bars successive section 2-1401 petitions that

assert issues that could have been raised in the original petition. *Village of Island Lake v. Parkway Bank & Trust Co.*, 212 Ill. App. 3d 115, 123 (1991). “Generally, the filing of a second section 2-1401 petition does not toll the 30 days provided for filing an appeal from denial of the first section 2-1401 petition.” *Holloway v. Kroger Company*, 253 Ill. App. 3d 944, 947 (1993). “[A] second post-judgment motion which is filed beyond 30 days after entry of the final order, and which attacks the same judgment, neither extends the time for filing the appeal nor continues the jurisdiction of the court.” *Id.* When a trial court rules on the merits of the last pending posttrial motion, the 30-day period for filing a notice of appeal commences to run. *Id.* at 948 (filing of second 2-1401 petition did not toll time for filing a notice of appeal, and, where the plaintiff filed a notice of appeal more than 30 days after the denial of the plaintiff’s first petition, it was untimely and the appellate court was without jurisdiction).

¶ 20 Here, the 30-day period for filing a notice of appeal began to run after the trial court denied defendant’s motion to vacate (*i.e.*, his first 2-1401 petition) on November 2, 2010. Defendant did not file a notice of appeal until April 28, 2011, which was more than 30-days after the court’s relevant ruling. Accordingly, this court does not have jurisdiction over this appeal and the appeal is dismissed.

¶ 21 III. CONCLUSION

¶ 22 For the foregoing reasons, this court is without jurisdiction and the appeal is dismissed.

¶ 23 Appeal dismissed.